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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 549

Case No. 609: RENNINGER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Hubert Thierry;

Whereas, on 28 June 1991, John Renninger, a staff member of the United Nations and former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, filed an application containing the following pleas:

"II. PLEAS

1. The Applicant invites the United Nations Administrative Tribunal to hold that the Secretary-General acted erroneously (and arbitrarily) in rejecting the unanimous recommendations of the Joint Appeals Board in its Report No. 813 concerning a case submitted by the Applicant. (...) The Applicant accordingly requests the United Nations Administrative Tribunal to direct the Secretary-General to implement the unanimous recommendation of the Joint Appeals Board that:

'(a) the necessary arrangements be made for the period 1 July 1975 to 30 November 1978 to be credited to the Appellant as pensionable service in the UNJSPF [United Nations Joint Staff Pension Fund],

(b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest.'"

Whereas the Respondent filed his answer on 13 November 1991;

Whereas the Applicant filed written observations on 17 January 1992;

Whereas, on 9 April 1992, the Executive Secretary of the Tribunal transmitted to the Secretary of the United Nations Joint Staff Pension Board the pleadings concerning this case, under article 21 of the Rules of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, who initially served with UNITAR from 1 September 1974 to 30 June 1975, on an "in-service training fellowship", was recruited by UNITAR on 1 July 1975. He was initially offered a one month "special fellowship" under specified terms and conditions set forth in a Letter of Award. The Applicant was entitled to a $1,350 monthly payment and to "other entitlements and benefits" such as annual leave, sick leave and compensation in the event of service incurred death, injury or illness. Although the Letter of Award provided that the Applicant would "not be entitled to any other benefits or payments", under a section on General Conditions it was specified that during the tenure of the appointment, the Applicant would "have the status of an official of the United Nations in accordance with Article 105 of the Charter of the United Nations, as applicable under article 5 of the Statute of UNITAR" and that "in other matters United Nations Staff Rules [would] apply, as determined by the Executive Director, in consultation with the Secretary-General of the United Nations and in accordance with the Statute of UNITAR." The "special fellowship" was extended for a series of successive fixed-term periods of varying duration, on the same terms and conditions, until 1 December 1978. In some of these extensions, changes were made in the monthly salary.

On 1 December 1978, the Applicant was offered a three-year fixed-term appointment under the 100 Series of the Staff Regulations and Rules, as Assistant to the UNITAR Director of Research and, upon its acceptance, became a participant in the UNJSPF. The Applicant's appointment was successively extended for a series of further fixed-term periods of different duration until 1 March 1990, when he was offered a permanent appointment. In the meantime, on 5 September 1989, the Applicant was transferred to the United Nations Secretariat. He presently works in the Department of Economic and Social Development.

On 26 October 1988, the Administrative Tribunal rendered Judgement No. 423, Isaacs against the Secretary-General of the United Nations - in which it held that the Applicant, Ms. Isaacs, who had served UNITAR on Letters of Award similar to the one granted to the present Applicant, was during the period of her service, a staff member of the United Nations. As such, she would, under the then existing UNJSPF Regulations have become a participant, when she completed one year of service under her original appointment and its subsequent extensions. Consequently, not entering the Applicant in the Fund on that date "was an administrative error [by UNITAR] which should be corrected." (paras. IV and VII).

In a letter dated 6 February 1990, the Applicant requested of the Secretary, UNJSPF, "implementation of the validation of non-contributory service at UNITAR for the period 1 July 1975 to 30 November 1978", during which the Applicant "served at UNITAR under the terms of a Letter of Award and had the status of a United Nations staff member." He noted that the issues raised by his request for validation had been "thoroughly examined and decided upon by the Administrative Tribunal in case No. 453 (Isaacs vs. The Secretary-General of the United Nations)." He argued that his "own situation [was], in all its essentials ... identical to [Ms. Isaacs']". In a reply dated 22 February 1990, the Secretary of the UNJSPF asked the Applicant to ascertain from the UNITAR Administration and/or the Under-Secretary-General for Administration and Management, whether he was eligible to validate non-contributory service performed with UNITAR, in light of the Isaacs decision.

The Applicant then wrote to the Acting Under-Secretary-General for Administration and Management, requesting him to confirm to the Secretariat of the UNJSPF that he was eligible for participation in the Fund for the period 1 July 1975 to 30 December 1978. In a reply dated 10 May 1990, the Acting Under-Secretary-General for Administration and Management rejected the Applicant's request, essentially on the grounds that his claim had been made more than 11 years after the events on which he relied and was "therefore time-barred under article 23 of the UNJSPF Regulations". In addition, he stated:

"Furthermore, I should like to advise you that your claim is clearly distinct from the case of Isaacs and cannot be based on UNAT Judgement No. 423. The Applicant in Isaacs duly filed her request on 19 November 1985, which was well within the statutory one-year time-limit of her having become a participant with the UNJSPF as of 1 January 1985. Secondly, your substantive appointments from 1 July 1975 to 30 November 1978, under UNITAR Letters of Award were on a 'special fellowship' scheme for a limited period, clearly stating that you were serving under a special scheme with different terms of service from regular staff."

On 8 June 1990, the Applicant requested the Secretary-General to review the administrative decision by the Acting Under-Secretary-General for Administration and Management. Having received no reply, on 8 August 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 5 February 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

14. The Panel unanimously finds that Appellant was a staff member of the United Nations from 1 July 1975 and was consequently entitled to participate in the UNJSPF.

15. The Panel, therefore, unanimously recommends that:

(a) the necessary arrangements be made for the period 1 July 1975 to 30 November 1978, to be credited to the Appellant as pensionable service in the UNJSPF,

(b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest."

On 2 April 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision. His decision was based on the following considerations:

"(a) that, in a letter dated 26 April 1977 addressed to the UNITAR Executive Director, [the Applicant] acknowledged that [he was] not contractually entitled to the benefit of participation in the United Nations Joint Staff Pension Fund;

(b) that [he] did not act with reasonable dispatch in filing [his] appeal."

On 28 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent acted erroneously and arbitrarily in rejecting the unanimous recommendations of the Joint Appeals Board.

2. The Applicant's case is identical to the Isaacs case and therefore Judgement No. 423, Isaacs, applies mutatis mutandis tc the Applicant's appeal.

3. The Applicant acted with reasonable dispatch in requesting the Respondent to apply the Isaacs decision to his case.

Whereas the Respondent's principal contentions are:

1. The appeal against exclusion from the UNJSPF was not timely.

2. The Applicant's participation in the UNJSPF was expressly excluded by the terms of his appointment and satisfied the requirements of the UNJSPF Regulations.

3. The Applicant has produced no evidence to show that the Respondent's discretionary decision not to accept the Joint Appeals Board recommendation in the Applicant's case was arbitrary or based on improper motivation.

The Tribunal, having deliberated from 3 to 17 June 1992, now pronounces the following judgement:

I. The Applicant challenges a decision of the Secretary-General dated 2 April 1991, rejecting a unanimous recommendation of the Joint Appeals Board (JAB) that:

> "(a) The necessary arrangements be made for the period 1 July 1975 to 30 November 1978 to be credited to the Appellant as pensionable service in the UNJSPF,
>
> (b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest."

Although the Respondent ordinarily accepts unanimous JAB recommendations, his position is that a unanimous recommendation will be accepted unless an important issue of policy or principle is involved, as in this case. Here, the Secretary-General did not consider himself bound to accept the JAB recommendation for this reason. The Tribunal will examine the legal considerations involved.

II. In essence, the Applicant's case rests on his belief that his situation is identical to that of the Applicant in Judgement No. 423, Isaacs (1988). The JAB found that the Applicant was right on this score and its recommendation was based on that finding. However, the Tribunal does not share the view taken by the JAB. But this in no way signifies any departure by the Tribunal from its decision in Isaacs.

III. To begin with, in Isaacs, the Applicant, within a year of becoming a participant in the UNJSPF made known her contention that she was entitled to validation for pension purposes of her services as a staff member of UNITAR during periods prior to the announced effective date of her participation. The basic issue in that case concerned the question whether the absence of an express exclusion of her participation from the Pension Fund in the language of various Letters of Award under which she served prevented the Respondent from successfully asserting that she was not entitled to such participation during those periods. That issue in Isaacs was resolved in the Applicant's favour.

IV. In the present case, unlike Isaacs, the central issue is whether undue delay by the Applicant prevents him from availing himself of the result reached in Isaacs. The Applicant became a participant in the UNJSPF on 1 December 1978. He is seeking recognition for pension purposes of non-contributory service in UNITAR from 1 July 1975 to 30 November 1978. The facts in the present case show that the Applicant was, or should have been, aware many years before 6 February 1990, when he first claimed entitlement to recognition of non-contributory service for the period 1 July 1975 to 30 November 1978, that, at the very least, there was a substantial disagreement as to whether he

was entitled to such recognition. The evidence shows that as early as October 1984, more than five years before his request, the Applicant was aware of this issue. It also shows that, as early as 3 January 1985, he was aware that he had a personal stake in its ultimate resolution. The Applicant's delay, until February 1990, in seeking a resolution of his personal situation is, in the view of the Tribunal, fatal to his claims. The JAB's contrary view regarding delay is simply at odds with the facts and cannot be accepted by the Tribunal.

V. The post-1985 delay was plainly detrimental to the Respondent since his financial obligation for the actuarial expense of recognizing past service would increase with the passage of time. Under such circumstances, it would be unjust in the extreme to ignore the conduct of the Applicant in delaying for so long the assertion of his claim. Basic principles of negligence or estoppel are, in the view of the Tribunal, applicable in the circumstances of this case to bar the Applicant's claim for relief. (Cf. Judgement No. 302, Zemanek (1983)).

VI. It is suggested that, until the Tribunal's Judgement in Isaacs on 26 October 1988, the Applicant could not have known that he was entitled to recognition of his past service and that the period between 26 October 1988 and 6 February 1990, did not reflect unreasonable delay on the part of the Applicant. Even assuming, for the sake of argument, that the question of delay is to be judged, not on the basis of when the Applicant was aware of his claim and of substantial disagreement as to his entitlement, but on the basis of when the Applicant was, or should have been, aware of a decision possibly favourable to his point of view, the Tribunal finds no justification at all for a delay of over 15 months from the date of issuance of the Isaacs decision, notwithstanding that the Applicant may not have learned of the decision immediately. Having said this, the Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered. One acts at one's own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right.

VII. The Respondent argues that, unlike the situation in Isaacs, the Applicant in this case is shown by a communication dated 26 April 1977, and other evidence, to have had actual knowledge prior to 1 December 1978, that his exclusion from participation in the UNUSPF was a condition of his service with UNITAR. Since the Tribunal has concluded that, in the circumstances of this case, the delay on the part of the Applicant in raising his claim was unreasonable and prejudicial, the Tribunal does not consider it necessary to deal with the other arguments advanced by the Respondent.

VIII. Finally, although the Applicant has asserted that the Respondent acted arbitrarily or was motivated by extraneous factors in rejecting the Applicant's claim, there is no evidence supporting such a contention. As the Tribunal has found, the Respondent was on sound ground in rejecting the claim for failure on the part of the Applicant to act with reasonable dispatch.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Hubert THIERRY
Member

Geneva, 17 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary